85-1751

No. .....

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1985

OTTMAN CUSTOM PROCESSORS, INC.
AND JOSEPH PIPERATO,

Petitioners,

v.

SECRETARY OF LABOR,
U.S. DEPARTMENT OF LABOR,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTION PRESENTED

Whether or not a court may assess coercive fines in a civil contempt proceeding without permitting the contemnor to purge himself of the contempt.

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Ottman Custom Processors, Inc. and Joseph Piperato petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit entered in this case on February 5, 1986.

—o—

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*) is reported at 783 F.2d 8 (1st Cir. 1986). The opinion of the district court (App. B, *infra*) is reported at 609 F. Supp. 189 (D. Mass. 1985).

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JURISDICTION

The judgment of the court of appeals was entered February 5, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. Section 2101(c).

—o—

STATEMENT OF THE CASE

On November 19, 1984, a United States Magistrate issued an inspection warrant to an OSHA compliance officer to conduct a comprehensive safety inspection of the petitioners' plant in Wilkinsonville, Massachusetts. On November 21, 1984, an OSHA officer served the warrant on the petitioners and commenced the inspection. The of-

ficer alleged that the petitioners unduly restricted the inspection and subsequently petitioned for an adjudication of civil contempt against the petitioners. On Wednesday, May 15, 1985, the trial judge issued a memorandum finding the petitioners in civil contempt and ruling that Ottman, the corporate petitioner, should pay a $200 fine per day and Piperato, the individual petitioner, should pay a $100 fine per day "until the Magistrate's order is fully complied with". The order contained *no* provision which allowed the petitioners to purge themselves of contempt by complying with the Magistrate's order.

On Friday, May 17, 1985, counsel for the petitioners received the trial court's order. On Monday, May 20, 1985, the officer returned to the plant to conduct the safety inspection under the warrant. OSHA never attempted to conduct the second inspection prior to Monday, May 20, 1985. The parties agree that the petitioners fully complied with the warrant on Monday, May 20, 1985. On July 16, 1985, the respondent brought a motion for an order requiring payment of fines which the petitioners opposed. On September 5, 1985, the trial judge allowed the respondent's motion which required Ottman to pay a $800 fine and Piperato to pay a $400 fine. The per diem fines covered the four-day period between the date of the trial court's order and the date the officer returned to the plant to conduct the safety inspection.

The petitioners appealed the imposition of the fines to the United States Court of Appeals for the First Circuit as arbitrary, an abuse of discretion and patently unfair. The court of appeals reasoned that the trial judge erred in imposing fines prior to the date the petitioners

received his order. The court of appeals held, however, that upon receipt of the trial court's order the petitioners had a duty to telephone OSHA and request a safety inspection. The court of appeals vacated the order of the district court and remanded the case with instructions to issue an order assessing a $600 fine against Ottman and a $300 fine against Piperato. The fines imposed by the court of appeals covered the three-day period between the date the petitioners' counsel received the trial court's order and the date the officer returned to the plant to conduct the safety inspection.

REASONS FOR GRANTING THE WRIT

This case represents a special and important issue for the Court because the court of appeals has departed from the accepted parameters of judicial authority so as to require this Court to exercise its supervisory powers. The court of appeals imposed penal, noncoercive fines against the petitioners without affording them the protections of due process. The decision of the court of appeals ignores well established precedent that a court may not impose noncoercive, penal fines in civil contempt proceedings. Unless reversed, the decision will deter legitimate claimants in the future from seeking judicial review of administration abuses.

The petitioners received notice of the trial court's finding and order on Friday, May 17, 1985. The trial court found the petitioners in civil contempt and ordered the

petitioners to comply with the inspection warrant issued to OSHA. The petitioners fully complied with the trial court's order by allowing the OSHA compliance officer to inspect their plant the following Monday, May 20, 1985. *McDonald's Corp. v. Victory Inv.*, 727 F.2d 82, 85 (3d Cir. 1984). The respondent did not exercise its right to inspect the plant prior to May 20, 1985. Moreover, the trial court's order did not require the petitioners to contact OSHA to arrange the safety inspection. In assessing fines against the petitioners, the court of appeals has based the amount of the penalty upon the date OSHA decided to conduct its inspection rather than upon the date the petitioners complied with the inspection warrant. The court of appeals' decision gives the government the power to decide the amount and severity of the coercive sanction in a civil contempt action. To increase the fines the OSHA compliance officer could have delayed the inspection indefinitely, despite the petitioners' intentions to comply with the trial court's order. Neither judicial precedent nor statute support this grant of power to the government in civil contempt proceedings.

The petitioners were found in civil, not criminal, contempt. Consequently, the trial court could not impose penal fines against the petitioners because it did not invoke the stringent procedural safeguards required by due process. *See Latrobe Steel Co. v. United Steelworkers of Am.*, 545 F.2d 1336, 1343 & n. 33 (3d Cir. 1986). Fines could only be imposed to coerce the petitioners to comply

with the inspection warrant.[1] *Perfect Fit Indus., Inc. v. Acme Quilting Co.*, 673 F.2d 53, 56 (2d Cir.), *cert. denied*, 459 U.S. 832 (1982); *Nasco, Inc. v. Calcasieu Television & Radio, Inc.*, 583 F. Supp. 115, 121 (W.D. La. 1984). Both the trial court and the court of appeals erred in imposing fines against the petitioners because the petitioners' contumacy had terminted, and there was no need to coerce compliance almost four months after the petitioners had consented to the safety inspection. *McDonald's Corp. v. Victory Inv.*, 727 F.2d 82, 87 (3d Cir. 1984); *see United States v. United Mine Workers of Am.*, 330 U.S. 258, 304 (1947). The fines imposed by the court of appeals only serve to penalize the petitioners, and penal fines are prohibited in civil contempt proceedings. *Nasco, Inc. v. Calcasieu Television & Radio, Inc.*, 583 F. Supp. 115, 121 (W.D. La. 1984); *see Federal Election Comm'n v. Gus Savage for Congress*, 606 F. Supp. 541, 547 (N.D. Ill. 1985). In addition, any order to assess fines for civil contempt had to give the petitioners an opportunity to comply with the inspection warrant, thus purging themselves of their contempt.[2] *McDonald's Corp. v. Victory Inv.*,

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[1] A court may also order the contemnor to pay damages resulting from the civil contempt. *See Perfect Fit Indus., Inc. v. Acme Quilting Co.*, 673 F.2d 53, 56 (2d Cir.), *cert. denied* 459 U.S. 832 (1982); *Nasco, Inc. v. Calcasieu Television & Radio, Inc.*, 583 F. Supp. 115, 121 (W.D. La. 1984). The petitioners were ordered and paid the respondent's attorneys' fees, costs and other damages in the amount of $3,279.57. The petitioners did not appeal the assessment of these damages.

[2] For an example of an order which allows the contemnor to purge himself of the contempt through compliance, see *Transportes Aereos De Angola v. Ronair, Inc.*, 104 F.R.D. 482, 503-04 (D. Del. 1985). *See generally In re Dinnan*, 625 F.2d 1146, 1149 (5th Cir. 1980) (court's order "wholly conditional" upon contemnor's continued refusal to comply).

727 F.2d 82, 87 (3d Cir. 1984) (quoting *Latrobe Steel Co. v. United Steelworkers of Am.*, 545 F.2d 1336, 1344 (3d Cir. 1976)); *In re Irving*, 600 F.2d 1027, 1031 (2d Cir.), *cert. denied*, 444 U.S. 866 (1979). Neither the trial court's order nor the court of appeals' order contained a purgation clause.

Finally, the court of appeals reasoned that the petitioners had a duty to inform the respondent, on the day counsel for the petitioners received the trial court's order, to inform the respondent that they would comply with the inspection warrant. Since the petitioners breached this "duty", the court of appeals imposed fines against the petitioners. The court of appeals cites no authority for its holding. In addition, the court of appeals' order goes beyond the scope of the trial court's order. The trial court did not order the petitioners to contact OSHA to arrange a date for the safety inspection, but only ordered the petitioners to comply with the inspection warrant. The respondent also received notice of the trial court's decision and could have initiated the inspection on Friday, May 17, 1985. OSHA did not need the petitioners' permission to inspect the plant since the trial court had ordered the inspection. The "duty" placed upon the petitioners by the court of appeals serves no legal purpose but to justify the imposition of fines. This justification must fail, however, because the fines imposed are plainly penal in nature and thus prohibited in this civil contempt action. *Nasco, Inc. v. Calcasieu Television & Radio, Inc.*, 583 F. Supp. 115, 121 (W.D. La. 1984). The order of the court of appeals should therefore be vacated, the fines dismissed and the monies returned to the petitioners with interest and costs.

CONCLUSION

For the foregoing reasons the petition for writ of certiorari should be granted.

Respectfully submitted,

OTTMAN CUSTOM
PROCESSORS, INC. and
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APPENDIX A

SECRETARY OF LABOR, U.S.
DEPARTMENT OF LABOR,

Respondent, Appellee,

v.

OTTMAN CUSTOM PROCESSORS, INC.
AND JOSEPH PIPERATO,

Petitioners, Appellants.

No. 85-1719.

United States Court of Appeals,
First Circuit.

Argued Jan. 7, 1986.

Decided Feb. 5, 1986.

Employer was found guilty by the United States District Court for the District of Massachusetts, Andrew A. Caffrey, Chief Judge, of civil contempt and was ordered to pay $300 a day fine until it complied with order to permit Occupational Safety and Health Administration inspection of its premises. Employer appealed. The Court of Appeals held that employer could not be ordered to pay fine until after employer was aware of finding of civil contempt; however, fact that OSHA inspector did not appear until three days later did not prevent imposing fine during those days.

Vacated and remanded with instructions.

William W. Hays, with whom Chris W. Wert, Bowditch & Dewey, were on brief, for petitioners, appellants.

Morris R. Parker, Jr., with whom Frank A. White, Associate Solicitor for Occupational Safety and Health, Joseph M. Woodward, Counsel for Appellate Litigation, Andrea C. Casson, Asst. Counsel for Appellate Litigation, and Francis X. Lilly, Solicitor of Labor, were on brief, for respondent, appellee.

Before COFFIN and ALDRICH, Circuit Judges, and ROSENN, Senior Circuit Judge.*

PER CURIAM.

On May 15, 1985 the district court, 609 F.Supp. 189, found defendants, Ottman Custom Processors and Joseph Piperato, guilty of civil contempt and ordered payments of $300 a day until compliance with an order to permit OSHA inspection of Ottman's premises. The order was received on Friday, May 17. Defendants remained mute. On Monday, May 20, an OSHA inspector appeared and was finally allowed to inspect.

The district court assessed fines, as requested by the Secretary, in the amount of $1200 for May 16, 17, 18, and 19. The defendants' opposition consisted of an affidavit supporting their statement that they did not receive the

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* Of the Third Circuit, sitting by designation.

court's order until May 17, and the averment that they "could not comply . . . until OSHA appeared for the inspection" on May 20.

It having been impossible for defendants to have signified their willingness to comply with an order the existence of which was unknown to them on May 16, we must hold, as now the Secretary belatedly concedes, that no fines should have been assessed for that day. Indeed, we suspect that had this point been more directly called to the court's attention, instead of being buried in a factual statement and affidavit, it would have corrected its order.

As for appellants' sole argument made to us that they "could not have unilaterally complied with the warrant because an OSHA compliance officer had to conduct the safety inspection", we condemn it as either superficial or disingenuous. With a record in this proceeding of resistance to inspections, both warrantless and with warrant, and findings by both magistrate and judge regarding such resistance, defendants were in no position to assume that sitting on their hands would toll the fines. They held the key to purgation—a simple telephone call to OSHA stating that defendants would no longer resist inspection. Moreover, the background of intransigence was such that, absent a call, the Secretary might well assume that difficulties would continue, necessitating special planning to cope with unpleasantness.

We might have questioned whether, in the absence of any evidence that OSHA was prepared to inspect on a Sunday, fines for May 19 should be included. But as we

have indicated, such a selective argument was made neither below nor on appeal.

The order of September 5, 1985 is vacated and the cause remanded with instructions to issue an order assessing a fine of $600 upon Ottman Custom Processors, Inc. and a fine of $300 upon Joseph Piperato. No costs.

APPENDIX B

SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,
Plaintiff,

v.

OTTMAN CUSTOM PROCESSORS, INC.
and Joseph Piperato,
Defendants.

Civ. A. No. 84-4051-C.

United States District Court,
D. Massachusetts.

May 15, 1985.

On petition for adjudication of civil contempt by the Secretary of Labor against employer and its president, the District Court, Caffrey, Chief Judge, held that the defendants totally frustrated reasonable attempts by the Labor Department to inspect working areas of employer's premises as mandated by the Occupational Safety and Health Act.

Order accordingly.

David A. Snyder, U.S. Dept. of Labor, Solicitor's Office, Boston, Mass., for plaintiff.

William W. Hays, Bowditch & Dewey, Worcester, Mass., for defendants.

MEMORANDUM

CAFFREY, Chief Judge.

This is a petition for adjudication of civil contempt filed December 14, 1984 by the Secretary of Labor against Ottman Custom Processors, Inc. and Joseph Piperato, its president. The petition recites that on November 19, 1984 a United States Magistrate issued a warrant for inspection under the Occupational Safety and Health Act (29 U.S.C. § 651 *et seq.*) herein after OSH Act. The warrant authorized Nelson F. Barnes or any other authorized Department of Labor Compliance Safety and Health Officer to enter and inspect the premises of Ottman Custom Processors, Inc. ("Ottman") at 1 Blackstone Street, Wilkonsonville, Massachusetts. The application for the warrant and the warrant are appended to the complaint as Exhibits B and A respectively. The complaint further alleges that on November 21, 1984 Compliance Officer Barnes served the inspection warrant on Toni Rodriques, the personnel director at Ottman whereupon Rodriques handed a notice of protest to Officer Barnes.

The matter came before the Court for a hearing on an order to show cause issued by the undersigned on January 21, 1985.

At the hearing testimony was heard from Compliance Officer Nelson F. Barnes, called by the Secretary of Labor, and from Toni Rodriquez, Stacey Wright, Joseph Piperato, and Thomas Shea, called by the defendants. Post hearing memonanda of law were filed by the parties and after hearing, I find and rule as follows.

The inspection warrant issued by the Magistrate meets the probable cause standards required by the Supreme Court's decision in *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 98 S.Ct. 1816, 56 L.Ed.2d 305 (1978). I further find that respondents refused to allow Officer Barnes to conduct a normal and meaningful inspection of respondents premises, that respondents refused to allow the inspector to privately question employees at respondent's place of business, and that respondent unreasonably refused Officer Barnes' request to have employees explain and demonstrate the machines and equipment being used on the premises. I further find that respondents unreasonably delayed Barnes' access into the working areas of the Ottman work place for about five hours and that the conduct of respondents' Piperato and Ottman employee, Rodriques totally frustrated reasonable attempts by the Labor Department to inspect those premises as mandated by Congress under the Act. I find and rule that both Ottman and Piperato are guilty of civil contempt consisting of their refusal to comply with the Magistrate's lawful order. I rule that because of their illegally obstructive conduct that an order should be entered directing Ottman to pay $200 per day and Piperato to pay $100 per day until the Magistrate's order is fully complied with and I further rule that Ottman should pay the costs of bringing and trying this action.

Supreme Court, U.S.
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No. 85-1751

In the Supreme Court of the United States

OCTOBER TERM, 1985

OTTMAN CUSTOM PROCESSORS, INC., ET AL., PETITIONERS

v.

WILLIAM E. BROCK, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1751

OTTMAN CUSTOM PROCESSORS, INC., ET AL., PETITIONERS

v.

WILLIAM E. BROCK, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioners challenge a $900 fine imposed in civil contempt proceedings to induce their compliance with a warrant authorizing an inspection by the Department of Labor's Occupational Safety and Health Administration (OSHA).

1. Petitioner Joseph Piperato is the president of petitioner Ottman Custom Processors, Inc., an employer covered by the Occupational Safety and Health Act of 1970, 29 U.S.C. (& Supp. II) 651 *et seq*. On November 19, 1984, a United States Magistrate issued a warrant requiring Ottman to permit an inspection of its premises by OSHA. When an OSHA compliance officer served the inspection warrant, on November 21, 1984, Ottman and Piperato delayed the inspection for several hours. They also refused to permit the compliance officer to question employees privately and to request the employees to explain and demonstrate the equipment with which they worked. The compliance officer consequently left the premises without completing the inspection. Pet. App. 6-7.

On December 14, 1984, the Secretary of Labor filed a petition for an adjudication of civil contempt against Piperato and Ottman in the United States District Court for the District of Massachusetts. On January 21, 1985, the district court issued an order requiring Ottman and Piperato to show cause why they should not be adjudicated in civil contempt for refusing to comply with the inspection warrant. Testimony was presented at a hearing on the order and both parties submitted post-hearing briefs. Pet. App. 6.

In a memorandum opinion and order dated May 15, 1985, the district court concluded that the inspection warrant was valid (Pet. App. 7). The court found that Ottman and Piperato had refused to allow a "normal and meaningful inspection" of Ottman's premises and that their conduct "totally frustrated reasonable attempts by the Labor Department to inspect those premises as mandated by Congress under the Act" (*ibid.*). Based on these findings, the court held both Ottman and Piperato in civil contempt for refusing to comply with the inspection warrant (*ibid.*). It ordered Ottman to pay a fine of $200 per day and Piperato to pay a fine of $100 per day "until the Magistrate's order is fully complied with" (*ibid.*).

Ottman and Piperato received the district court's order on May 17, 1985 (Pet. 2). On May 20, 1985, the compliance officer returned to Ottman to conduct the inspection, which was completed on the same date (*ibid.*). Thereafter, at the Secretary's request, the district court assessed the fines imposed by the court's May 15, 1985, order against Ottman and Piperato for each of the days from May 16, 1985 through May 19, 1985 (Pet. App. 2). The fine thus totalled $1,200 (*ibid.*).

The court of appeals affirmed in part. It held that the district court should not have assessed fines for May 16 since Ottman and Piperato did not receive the district court's order until May 17 (Pet. App. 3). The court,

however, rejected the argument of Ottman and Piperato that they were unable to comply with the order before May 20 as "either superficial or disingenuous," since Ottman and Piperato "held the key to purgation—a simple telephone call to OSHA stating that defendants would no longer resist inspection" (*ibid.*). The court of appeals therefore upheld the district court's decision to assess fines for May 17 through May 19 because "[w]ith a record in this proceeding of resistance to inspections, both warrantless and with warrant, and findings by both magistrate and judge regarding such resistance, defendants were in no position to assume that sitting on their hands would toll the fines" (*ibid.*). Consequently, the court vacated the district court's order of September 5, 1985, and remanded the case with instructions to assess a total fine of $900 (*id.* at 4).

2. The court of appeals correctly decided that the district court did not abuse its discretion by assessing fines from May 17 through May 19. The court's decision does not conflict with any decision of any other court of appeals or with any decision of this Court. The decision, moreover, involves only the application of judicial discretion and well-settled legal principles to the particular facts of this case. It therefore plainly does not warrant review by this Court.

Petitioners primarily contend that the courts below impermissibly imposed punitive fines in a civil contempt proceeding without affording petitioners the due process required in a criminal contempt proceeding.[1] Petitioners err

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[1] The fundamentals of due process in civil contempt proceedings are notice and an opportunity to defend. *Skinner* v. *White*, 505 F.2d 685, 690 (5th Cir. 1974); *Parker* v. *United States*, 153 F.2d 66, 70 (1st Cir. 1946). Although more stringent protections may apply in criminal contempt proceedings (see *Bloom* v. *Illinois*, 391 U.S. 194, 209 (1968); Fed. R. Crim. P. 42(b)), those protections are not prerequisites to orders imposing coercive civil sanctions. *Latrobe Steel Co.* v.

in contending that the sanction imposed in this case is a criminal, or punitive, fine rather than a civil, or coercive, fine. Criminal contempt vindicates the authority of the court by punishing past acts of disobedience. See, *e.g.*, *McDonald's Corp.* v. *Victory Investments*, 727 F.2d 82, 87 (3d Cir. 1984); *In re Irving*, 600 F.2d 1027, 1031 (2d Cir.), cert. denied, 444 U.S. 866 (1979); *Latrobe Steel Co.* v. *United Steelworkers Local 1537*, 545 F.2d 1336, 1343 (3d Cir. 1976). Thus, in criminal contempt proceedings, a court may impose a fine that is unconditional and payable even if the contemnor complies with the court's order on the same day that it is issued. Civil contempt, on the other hand, benefits the plaintiff by coercing present or future compliance with the court's order. *In re Dinnan*, 625 F.2d 1146, 1149 (5th Cir. 1980). In civil contempt proceedings, therefore, a court is limited to imposing coercive fines that are prospective and wholly contingent on the contemnor's continued noncompliance. See, *e.g.*, *McDonald's Corp.*, 727 F.2d at 87; *Latrobe Steel Co.*, 545 F.2d at 1343-1344 & n. 34, 35.[2]

The fines in this case were wholly conditional upon petitioners' compliance with the inspection warrant. The fines were prospective only and payable only until the completion of an inspection in accordance with the inspection warrant. Petitioners, moreover, "held the key to purgation," as the court of appeals noted (Pet. App. 3), and

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United Steelworkers Local 1537, 545 F.2d 1336, 1343 n.33 (3d Cir. 1976). In this case, the district court notified petitioners of the Secretary's petition for an adjudication of civil contempt in the show-cause order dated January 21, 1985, and afforded petitioners an opportunity to defend both at the hearing on the order and in a post-hearing brief (Pet. App. 6). No further protections were required to order payment of a civil fine. See *United States* v. *Westinghouse Electric Corp.*, 648 F.2d 642, 652 (9th Cir. 1981).

[2] Civil contempt also may be employed to compensate a complainant for actual losses sustained. *United States* v. *United Mine Workers*, 330 U.S. 258, 303-304 (1947). The district court ordered petitioners to pay compensatory damages totalling $3,279.57, and petitioners have not challenged that award (Pet. 5 n.1).

"could have purged themselves of contempt and of any fine through timely compliance" (*United States* v. *Westinghouse Electric Corp.*, 648 F.2d at 651). In these circumstances, it is clear that the fines were coercive, not punitive, and that they were properly imposed in the civil contempt proceedings below. See *Shillitani* v. *United States*, 384 U.S. 364, 368-370 (1966); *Westinghouse Electric Corp.*, 648 F.2d at 651; *In re Dinnan*, 625 F.2d at 1149.[3]

Petitioners argue (Pet. 5) that the fines imposed were punitive because they were assessed four months after they had consented to the inspection when there was no longer any "need to coerce compliance." But the question whether sanctions are punitive or coercive depends on the purpose for which they were imposed (*Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418, 443 (1911); *Shillitani*, 384 U.S. at 368-370), and the district court plainly imposed the sanction to insure that petitioners would comply promptly with the inspection warrant. The court of appeals recognized that petitioners needed to be motivated to comply, noting that "the background of intransigence was such that * * * the Secretary might well assume that difficulties would continue" (Pet. App. 3).[4]

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[3] Petitioners' suggestion (Pet. 5) that the district court's imposition of fines was not conditional because the order did not specify means by which the contemnor could purge itself of contempt is frivolous. While such a purge clause might be included in an order imposing a determinate sentence (see *Shillitani*, 384 U.S. at 370 n.6), it is plainly unnecessary where, as here, the order merely directs the payment of fines "until the Magistrate's order is fully complied with" (Pet. App. 7).

[4] Contrary to petitioners' suggestion (Pet. 5-6), their circumstances are plainly unlike the circumstances of the contemnors in *McDonald's Corp.*, 727 F.2d at 85, where a contempt order dated February 10, 1983, imposed fines for past disobedience beginning on October 14, 1982, since the fine imposed on petitioners was prospective only. Moreover, the contempt order in this case is unlike the order in *In*

Petitioners also argue that they were unable to comply with the inspection warrant before May 20 because the OSHA inspector did not appear before that date (Pet. 4). Although inability to comply may be a defense to civil contempt (see *Newman* v. *Graddick*, 740 F.2d 1513, 1525 (11th Cir. 1984)), the court of appeals properly rejected petitioners' contention because petitioners made no effort to comply before May 20 (Pet. App. 3). Instead, petitioners incorrectly assumed that "sitting on their hands would toll the fines" (*ibid.*). See *Powell* v. *Ward*, 643 F.2d 924, 931 (2d Cir.), cert. denied, 454 U.S. 832 (1981). If petitioners had simply called OSHA on May 17 and stated that they would comply with the inspection warrant, it is apparent that the court of appeals would not have permitted the imposition of a fine.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

GEORGE SALEM
Deputy Solicitor of Labor

JUNE 1986

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re Irving, 600 F.2d at 1031, which levied a per-diem fine "regardless of subsequent compliance"; here the fine was terminated by compliance with the inspection warrant.

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